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No. 89-127

In the Supreme Court of the United States

OCTOBER TERM, 1989

PHILIP RANDY CASTIGLIONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the district court's determination that dismissal of an indictment with prejudice did not preclude prosecution on several counts of a superseding indictment, returned prior to the dismissal, which were identical to counts in the dismissed indictment.

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 7a-12a) is reported at 876 F.2d 73. The court of appeals' initial version of its opinion (Pet. App. 1a-6a), which is reported at 860 F.2d 351, has been withdrawn.

JURISDICTION

The judgment of the court of appeals was entered on October 28, 1988, and was amended on May 23, 1989. A petition for rehearing was denied on May 22, 1989. The petition for a writ of certiorari was filed on June 24, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On June 13, 1985, a 121-count indictment was returned against petitioner Philip Randy Castiglione and codefendants Charles Dadian and Joseph Guerriero. R.E. 19.[1] The indictment charged petitioner, Dadian, and Guerriero with conspiring to defraud the United States, in violation of 18 U.S.C. 371; mail fraud, in violation of 18 U.S.C. 1341; making false statements as to a material fact in a matter within the jurisdiction of a federal agency, in violation of 18 U.S.C. 1001; submitting false claims to collect federal crop insurance, in violation of 18 U.S.C. 287; and conversion of crops belonging to a federal agency, in violation of 18 U.S.C. 658.

Thereafter, the government filed a motion to dismiss without prejudice all but 29 counts of the indictment. R.E. 3, at p. 4. In support of its motion, the government asserted that the public interest would be served by granting the motion to dismiss certain counts because, given its length, the original indictment was not easily understandable and was subject to confusion. The government explained that the remaining 29 counts constituted the most significant violations and that these counts covered all three categories of activities outlined above. R.E. 3, at p. 8.

Following the retraction by a potential government witness of statements made both to government agents and to the grand jury, the government filed an amended motion to dismiss the indictment in its entirety, without prejudice. C.R. 77-79. In that motion, the government indicated that it intended to submit to the grand jury an indictment charging petitioner with tax violations, and it noted that the superseding indictment would include charges pertaining to crop insurance obtained by peti-

[1] "R.E." refers to the Record Excerpts filed in the court of appeals. "C.R." refers to the record of the clerk of the district court.

tioner. C.R. 77-78. At the hearing on the government's motion to dismiss, the government again informed the court that the superseding indictment would contain several counts similar to those found in the original indictment, as well as additional counts charging violations of the tax laws. R.E. 5, at pp. 4-6. The court refused to dismiss the original indictment without prejudice, stating that once the superseding indictment was filed, the original indictment would be dismissed with prejudice. R.E. 5, at pp. 11-12.

On June 26, 1986, the grand jury returned a nine-count superseding indictment charging petitioner with tax evasion, in violation of 26 U.S.C. 7201 (Counts 1 and 2); filing false income tax returns, in violation of 26 U.S.C. 7206(1) (Counts 3 and 4); submitting false claims to collect federal crop insurance, in violation of 18 U.S.C. 287 (Counts 5 through 8); and conspiracy to defraud the United States, in violation of 18 U.S.C. 371 (Count 9). R.E. 6. At petitioner's arraignment on the superseding indictment, the government moved to dismiss the original indictment without prejudice. The court indicated, however, that it would not dismiss the original indictment without prejudice and, unless the government moved to dismiss the indictment with prejudice, trial on the original indictment would be set for July 15, 1986. Consequently, the government requested that the original indictment be dismissed with prejudice, and its motion was granted. R.E. 7, at pp. 4-7; R.E. 8. At the arraignment on the superseding indictment, the trial judge noted that "the nontax matters [in the superseding indictment] are identical charges that were identified in the original indictment * * *." R.E. 7, at p. 10.

2. Petitioner subsequently filed a motion to dismiss Counts 5 through 9 of the superseding indictment. R.E. 10. He argued that those counts constituted a reindictment

of Counts 18, 21, 80, 108, and 1 of the original indictment and that the prosecution was barred by the doctrine of res judicata. R.E. 10, at pp. 5-6. The trial judge (the same judge who had dismissed the original indictment) denied the motion, holding that because jeopardy had not attached to either of the two concurrent indictments, the government could select the indictment on which it wanted to proceed to trial. R.E. 13, at pp. 7-8. As the district court held, "dismissal of the original indictment had no preclusive effect on the superseding indictment." *Ibid.*

In the court of appeals, petitioner contended that the Double Jeopardy Clause of the Fifth Amendment and the doctrine of res judicata barred prosecution on Counts 5 through 9 of the superseding indictment. The court of appeals rejected petitioner's claim, holding (Pet. App. 12a):

> Although the trial judge used the words "with prejudice," he did not intend the dismissal to bar prosecution on any charges contained in the pending superseding indictment. A judge's ruling does not bar further prosecution if it does not represent a resolution in favor of the defendant on some or all of the factual elements of the offense charged.

ARGUMENT

1. Petitioner contends (Pet. 5-6) that the court of appeals' decision violated the Double Jeopardy Clause of the Fifth Amendment. It is well established, however, that "jeopardy does not attach, and the constitutional prohibition can have no application, until a defendant is 'put to trial before the trier of the facts, whether the trier be a jury or a judge.' " *Serfass* v. *United States,* 420 U.S. 377, 388 (1975) (quoting *United States* v. *Jorn,* 400 U.S. 470, 479 (1971)). Jeopardy attaches in a non-jury trial when the trial court begins to hear the evidence, and, in a jury trial,

when the jury is empaneled and sworn. *Serfass*, 420 U.S. at 388. In short, where the issue of a defendant's guilt or innocence has not come before a trier of fact, the defendant has not been placed in jeopardy. Accordingly, dismissal of the indictment at that stage does not implicate the Double Jeopardy Clause: "[a]n accused cannot experience the threat of double jeopardy unless and until he has first been placed in jeopardy." *Rodrigues* v. *Gudeman*, 794 F.2d 1458, 1460 (9th Cir.), cert. denied, 479 U.S. 964 (1986).

In this case, the original indictment was still pending when the superseding indictment was returned. Following arraignment on the superseding indictment, and before any trial on the original indictment, the original indictment was dismissed. Since jeopardy had not yet attached prior to the dismissal of the original indictment, the government is not prohibited by the Double Jeopardy Clause from prosecuting petitioner on the superseding indictment.[2]

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[2] Petitioner also contends (Pet. 6) that the decision violates his right to a speedy trial. Preliminarily, we note that this contention was not raised in the court of appeals, and it is not appropriate for this Court to consider it in the first instance. See, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). Nor has petitioner identified any Speedy Trial issue in his statement of questions, as required by Rule 21.1(a) of the Rules of this Court. In any event, petitioner's contention that the government has unnecessarily delayed bringing this case to trial is meritless. The trial date was reset several times at the request of various parties in the case (R.E. 21); petitioner never sought dismissal of the indictment under Fed. R. Crim. P. 48(b) or the Sixth Amendment on the ground that the government had delayed unnecessarily in bringing him to trial. Nor did petitioner ever allege violations of the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.* Petitioner has therefore waived any claim that his right to a speedy trial was violated. W. LaFave & J. Israel, *Criminal Procedure* § 18.1(d) (1984).

2. Petitioner asserts (Pet. 7) that a dismissal with prejudice constitutes a determination on the merits and is a bar to any subsequent prosecution for the same offense. A dismissal with prejudice may represent a determination that bars the government from refiling the charges contained in the indictment. But in determining whether the trial court's dismissal of an original indictment extends to the offenses charged in a superseding indictment, the intent of the trial judge in rendering his decision must be considered. See *United States* v. *Scott*, 437 U.S. 82, 97 (1978) ("a defendant is acquitted only when 'the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged' ") (quoting *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977)); *Lee* v. *United States*, 432 U.S. 23, 30, 31 (1977) (in considering whether a government appeal from an order dismissing the indictment would violate the Double Jeopardy Clause, the "critical question is whether the order contemplates an end to all prosecution of the defendant for the offense charged," or whether the motion was granted "in contemplation of just such a second prosecution"); see also, *e.g.*, *United States* v. *Cejas*, 817 F.2d 595, 599-600 (9th Cir. 1987) (determining whether dismissal of indictment constituted ruling on the merits).

In this case, the record demonstrates that, when he dismissed the original indictment, the trial judge was aware that the superseding indictment contained counts charging offenses identical to those charged in the original indictment and did not intend his dismissal order to have any effect on those counts. R.E. 5, at pp. 4-6, 11-12; R.E. 7, at pp. 8, 10. For example, in discussing the upcoming trial on the superseding indictment, the court mentioned that several counts in that indictment were identical to counts contained in the original indictment, and it noted that peti-

tioner had already obtained discovery on Counts 5 through 9. R.E. 7, at p. 10. Had the court intended to prevent the government from going forward with those charges in the superseding indictment, it would have ordered those charges dismissed with prejudice as well.[3]

Thus, the order dismissing the original indictment with prejudice does not bar the government from prosecuting petitioner for those charges. See, *e.g.*, *United States* v. *Vaughan*, 715 F.2d 1373, 1376-1377 (9th Cir. 1983); *United States* v. *Dahlstrum*, 655 F.2d 971, 974 (9th Cir. 1981), cert. denied, 455 U.S. 928 (1982); *United States* v. *Choate*, 527 F.2d 748, 750-751 (9th Cir. 1975), cert. denied, 425 U.S. 971 (1976); *United States* v. *Hill*, 473 F.2d 759, 761-763 (9th Cir. 1972).[4]

3. Contrary to petitioner's assertions, the decision below conflicts with no decision of this Court or of any court of appeals. *United States* v. *Oppenheimer*, 242 U.S. 85 (1916), is not relevant here. That case established that

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[3] The trial judge stated that the reason he wanted to dismiss the original indictment with prejudice was "to prevent continued harassment by the Government against the defendant with regard to the 121 counts or some of them that were contained in the original indictment." R.E. 5, at p. 11. In other words, the judge wanted to ensure that the defendant would not be reindicted on any charges contained in the original indictment that were not found in the superseding indictment.

[4] Petitioner suggests (Pet. 8-9) that the government's failure to appeal from the trial court's order dismissing the first indictment with prejudice precludes it from now arguing that the trial judge did not intend the dismissal of the original indictment to have any effect upon the counts in the superseding indictment. That contention is meritless. The government itself had moved that the original indictment be dismissed with prejudice. The understanding of the parties and the court was that the dismissal of the original indictment cemented the government's decision to proceed on the superseding indictment. The government had no reason to object to that disposition.

a judgment of acquittal based on the statute of limitations is a bar to any subsequent prosecution for the same offense. As reviewed above, however, in this case the dismissal with prejudice of the first indictment was not an acquittal.

Petitioner's citation to *United States* v. *Cejas, supra,* and *United States* v. *Hayden,* 860 F.2d 1483 (9th Cir. 1988), is similarly unavailing. *Cejas* concerned the res judicata and collateral estoppel effects of a previous judicial determination that the Double Jeopardy Clause barred a defendant's reindictment.[5] *Hayden* concerned the circumstances in which a district court would be justified in dismissing an indictment because of bad faith on the part of the prosecution. Neither decision has any relevance to the case at hand.

None of the other court of appeals decisions that petitioner cites are at all helpful to him. None involves the factual situation presented here: a dismissal of one of two pending indictments before a defendant is placed in jeopardy, where the order of dismissal was based on the understanding that the dismissal confirms the government's decision to proceed to trial only on the counts in the remaining indictment.

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[5] In *Cejas,* the defendant was indicted on three occasions. The first indictment resulted in his conviction. The second indictment was dismissed on double jeopardy grounds because it charged the same conspiracy for which defendant had already been convicted. 817 F.2d at 596-597. Following the defendant's third indictment, the *Cejas* court held that the district court's dismissal of the second indictment on Double Jeopardy grounds constituted a final decision on the merits; the doctrines of res judicata and collateral estoppel therefore barred any further proceedings against the defendant on the same charges. 817 F.2d at 599-601.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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OCTOBER 1989

U.S. GOVERNMENT PRINTING OFFICE: 1989—262 203/00548